Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1998

LIDDLE & ROBINSON, L.L.P.,

Petitioner,

vs.

KIDDER PEABODY & CO., INCORPORATED,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Can an attorney for a claimant be sanctioned for invoking the aid of the state courts to ensure the fairness of an arbitration following the procedures approved by the Second Circuit Court of Appeals in *McMahon, et al. v. Shearson/American Express, Inc., et al.*, 896 F.2d 17 (2d Cir. 1990) and in this Court's decision in *Volt Information Sciences v. Leland Stanford Junior University*, 489 U.S. 468, 109 S. Ct. 1248 (1989), both of which approved the resort to interlocutory state law remedies in state courts involving pending arbitrations under the Federal Arbitration Act ("FAA")?

II. Is a Federal District Court, which has stayed an civil action in favor of arbitration under Section 3 of the FAA, empowered under the FAA to sanction a claimant's arbitration attorney (who had never previously appeared before the Court) for resorting to an interlocutory state law remedy in a state court located outside the territorial jurisdiction of the District Court where the action was originally filed?

PARTIES TO THIS PROCEEDING

1. Kidder Peabody & Co., Incorporated
   60 Broad Street
   New York, New York 10004

   - Defendant in the District Court, Appellee on the Appeal to the United States Court of Appeals for the District of Columbia Circuit, Respondent herein.

2. Linda E. LaPrade
   4520 Bayard Boulevard
   Bethesda, Maryland 20816

   - Plaintiff in the District Court, not a party to the Appeal in the court below.

3. Liddle & Robinson, L.L.P.
   685 Third Avenue
   New York, New York 10017

   - Arbitration attorneys for Plaintiff in proceedings before the District Court, Appellant on the Appeal to the United States Court of Appeals for the District of Columbia Circuit, Petitioner herein.

Upon information and belief, Kidder Peabody & Co., Incorporated is a wholly owned subsidiary of the Kidder Peabody Group which is a wholly owned subsidiary of the General Electric Company.

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Petitioner Liddle & Robinson, L.L.P. ("Liddle & Robinson" or the "Firm") respectfully requests that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION AND ORDERS BELOW

Judgment and Opinion filed in *Linda E. LaPrade, Liddle & Robinson, L.L.P. v. Kidder Peabody & Co., Incorporated*, __ U.S., App. D.C. __, 146 F.3d 899 (D.C. Cir. 1998) (App. A, B).

Three unreported orders entered by the United States District Court for the District of Columbia dated June 2, 1997, April 4, 1997 and December 9, 1996 in *Linda E. LaPrade v. Kidder Peabody & Co. Incorporated* (Civil Action 91-3330 (HHG)) (App. C, D, E).

The Memorandum and Order of the District Court which stayed Ms. LaPrade's civil action in favor of arbitration dated June 24, 1992 (App. F).

Two Orders dated August 24, 1998 denying a Petition for Rehearing and Suggestion for Rehearing *En Banc*, *Linda E. LaPrade, Liddle & Robinson, L.L.P. v. Kidder Peabody & Co., Incorporated* (App. G, H).

STATEMENT OF SUPREME COURT JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The petition for a writ of certiorari seeks review of a judgment and opinion entered June 23, 1998 by the United States Court of Appeals for the District of Columbia Circuit. *See* 146 F.3d 899 (D.C. Cir. 1998).

The Court of Appeals denied petitioner's petition for rehearing and suggestion for a rehearing *en banc* by unpublished orders dated August 24, 1998.

The petition is timely. It was filed within 90 days of the denial of the petition for rehearing by the Court of Appeals. *See* Supreme Court Rule 13.3.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION IN THE COURTS BELOW

The United States District Court for the District of Columbia had jurisdiction over the subject matter of this action under 28 U.S.C. § 1332.

The United States Court of Appeals for the District of Columbia Circuit had jurisdiction under 28 U.S.C. § 1291. The Court also had jurisdiction under the Collateral Order Doctrine first enunciated in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 69 S. Ct. 1221 (1949). *See also, e.g., Martin v. Brown*, 63 F.3d 1252 (3rd Cir. 1995).

STATUTES INVOLVED

9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement shall on application of one of the parties stay the trial of the

action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

28 U.S.C. § 1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

New York CPLR § 7502. Applications to the court; venue; statutes of limitation; provisional remedies.

(a) Applications to the court; venue. A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action. The proceeding shall be brought in the court and county specified in the agreement; or, if none be specified, in a court in the county in which one of the parties resides or is doing business, or, if there is no such county, in a court in any county; or in a court in the county in which the arbitration was held. All subsequent applications shall be made by motion in the pending action or the special proceeding.

STATEMENT OF THE CASE

This case presents the question of whether a party to an arbitration can properly invoke state remedies in a state court to insure the fairness of a pending arbitration in an action which has been stayed under § 3 of the Federal Arbitration Act.

Background

This case involves an arbitration conducted at the National Association of Securities Dealers, Inc. ("NASD") in New York City at 33 Whitehall Street and 125 Broad Street between Linda E. LaPrade (the "Claimant") and her former employer, Kidder Peabody & Co., Incorporated ("Kidder Peabody").

An appeal was taken from a sanction award under 28 U.S.C. § 1927 against Liddle & Robinson, a New York City law firm serving as Ms. LaPrade's arbitration counsel, in the amount of $74,951.14 imposed by the United States District Court for the District of Columbia (the District where the litigation originated).

The District Court for the District of Columbia imposed the sanction because the Claimant obtained an emergency *ex parte* order from the New York State Supreme Court which temporarily stayed the arbitration pending in New York City in which two key witnesses then under subpoena[1] had announced their refusal to appear and testify at the next arbitration session and because the arbitration was otherwise in disarray.

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1. The witnesses were then resident in California and Connecticut beyond the subpoena power of the District Court.

The Claimant sought *ex parte* relief in state court[2] on the day before the arbitration panel was scheduled to reconvene because the arbitration panel suddenly had issued an order earlier that same day requiring Claimant to proceed with the hearing even though the next two witnesses, both former senior executives of Kidder Peabody represented by Kidder Peabody's counsel, would not comply with their subpoenas.

In making her application to the state court, Claimant followed a New York state procedure expressly approved by the United States Court of Appeals for the Second Circuit in *McMahon v. Shearson/American Express*, 896 F.2d 17 (2d Cir. 1990).

Following full briefing and argument, on June 23, 1998, a panel of the United States Court of Appeals for the District of Columbia Circuit filed a 15 page opinion and entered a judgment affirming the award of sanctions.

The Court of Appeals apparently based its decision largely upon the fact that the Claimant had originally sought a permanent stay of the arbitration in its petition to the State Court. 146 F.3d at page 903. That portion of the Claimant's petition, however, was promptly and voluntarily withdrawn on December 3, 1996 even before the District Court heard argument on Kidder Peabody's motion for sanctions.

Liddle & Robinson's petition for rehearing and its suggestion for rehearing *en banc*[3] were denied by orders entered August 24, 1998.

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2. The District Court had not ordered that the arbitration be held within the District of Columbia under § 4 of the FAA, and the NASD determined that New York City was the proper venue for the arbitration.

3. The court's order recites that four members of the court did not participate in the making of the *en banc* order.

The Court of Appeal's mandate issued to the District Court on September 8, 1998.

REASONS FOR GRANTING THE WRIT

THE PETITION FOR A WRIT OF CERTIORARI PRESENTS SUBSTANTIAL AND IMPORTANT QUESTIONS FOR REVIEW

Both this case and *McMahon* involve an award of sanctions under 28 U.S.C. § 1927. Both cases involve applications by petitioners to invoke special remedies related to arbitrations under Article 75 of the New York Civil Practice Law and Rules ("CPLR") in the New York State Supreme Court. Both cases involve a petitioner's application for a temporary stay of a pending arbitration in New York City. In both cases, petitioners brought on their special proceedings under Article 75 of the CPLR by *ex parte* orders to show cause.

Claimant's invocation of a New York state court interlocutory remedy in a collateral New York state court proceeding is the identical procedure that the Second Circuit expressly approved in the *McMahon* case. As the Second Circuit said in *McMahon*, the only conduct subject to criticism was Shearson's decision to initiate "satellite litigation" for sanctions in the district court — precisely what Kidder Peabody did here.

The Firm petitioned the New York state court for relief under the New York statute because the Federal Arbitration Act ("FAA") does not provide for any comparable interlocutory relief in a pending arbitration and because of the territorial jurisdictional constraints on the District Court for the District of Columbia.

This Court has expressly approved the invocation of special state law remedies regarding arbitrations under the FAA, so long as they are not inconsistent with the FAA. *Volt Information Sciences, Inc. v. Leland Standford, Jr. University*, 489 U.S. 468, 109 S. Ct. 1248 (1989) (*Volt* involved the invocation of a California statute in the California courts to stay an arbitration. The Supreme Court held that the FAA did not preempt the California state statute or remedy.)

The issues the Firm presents in this petition for a writ of certiorari raise significant questions about compulsory arbitrations under the FAA as well as federal district court jurisdiction to monitor and superintend arbitrations pending outside a court's geographical district. Such questions are especially important where the federal court which has stayed a civil action in favor of compulsory arbitration, as occurred here, is distant from the location where the arbitration is required to proceed.[4]

Petitioner asks this Court to interpret Section 3 of the FAA, 9 U.S.C. § 3, in a manner that would allow the parties to an arbitration, such as the arbitration here, to seek and obtain interlocutory relief from a state court where the arbitration is pending and the relief sought is not inconsistent with the FAA. Petitioner believes that such an interpretation of Section 3 of the Act by this Court would promote the fairness and justice in arbitration that this Court has said a party to an arbitration is entitled to receive. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 1652 (1991).

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4. Under the venue rules of the NASD, New York City, the place where Kidder Peabody was headquartered, was determined to be the venue for this arbitration even though Claimant resides in the District of Columbia metropolitan area.

CONCLUSION

For the all of the foregoing reasons, Petitioner respectfully asks the Court to grant a writ of certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED JUNE 23, 1998

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 15, 1998 Decided June 23, 1998

No. 97-7107

LINDA E. LAPRADE,
LIDDLE & ROBINSON, L.L.P,
APPELLANT

v.

KIDDER PEABODY & CO., INCORPORATED,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 91cv03330)

Jacob A. Stein argued the cause for appellant, with whom *George A. Fisher* was on the briefs.

Andrew J. Schaffran argued the cause for appellee, with whom *Kathy B. Houlihan* was on the brief.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appendix A

Before: WILLIAMS, RANDOLPH and ROGERS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: In June 1992, the district court stayed an action brought by Linda E. LaPrade against her former employer, Kidder Peabody & Co., because the dispute was covered by a valid arbitration agreement. Due to various delays, the first set of arbitration sessions did not take place until May and June of 1995 and the next set was not scheduled to begin until November 1996. The day before the arbitration was to resume, LaPrade's counsel, appellant Liddle & Robinson, L.L.P., obtained an ex parte order from a New York state court staying the arbitration. Liddle & Robinson did not inform that court of the district court's earlier order staying the original action and retaining jurisdiction. On the motion of Kidder Peabody, the district court lifted the stay imposed by the state court, imposed sanctions against Liddle & Robinson under 28 U.S.C. § 1927 for its "vexatious and dilatory tactics," and awarded Kidder Peabody $74,951.14 in attorneys' fees. On appeal, Liddle & Robinson contends that the district court did not have jurisdiction to enter this order and that it abused its discretion by imposing sanctions. We affirm.

I.

On December 31, 1991, LaPrade filed suit against Kidder Peabody in the United States District Court for the District of Columbia. She asserted various common law and statutory claims arising from her employment and termination by Kidder Peabody; jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332. Because LaPrade and Kidder Peabody had entered into an arbitration agreement, Kidder Peabody moved to stay the action pursuant to section 3 of the Federal Arbitration Act ("Arbitration Act"), which directs that the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (1994). On June 24, 1992, the district court granted Kidder Peabody's motion to stay the action pending

arbitration and retained jurisdiction, instructing "the parties [to] notify the Court once arbitration is completed as to what further proceedings in this Court are appropriate."

Arbitration did not proceed smoothly. After appealing the initial stay order unsuccessfully and filing a second action in the district court against Kidder Peabody, which was consolidated with the first and likewise stayed pending arbitration,[1] LaPrade finally commenced arbitration before the National Association of Securities Dealers ("NASD") on September 30, 1993. After extensive discovery and repeated scheduling conflicts, the NASD held twelve hearing sessions in New York City between May 1 and June 21, 1995, almost three years after the initial stay order by the district court. Additional scheduling conflicts and a dispute among the members of the arbitration panel resulted in further delays, and the next round of hearings was not scheduled to begin until November 20, 1996.

The day before the hearings were set to recommence, however, Liddle & Robinson, whom LaPrade had retained to represent her before the NASD, filed an action in New York state court seeking an ex parte order that "the arbitration hearings ... be stayed and the parties referred to their court remedies, or in the alternative, that the NASD be ordered to disqualify the present arbitration panel, and for such other and further relief as may be just and proper." Notably, Liddle & Robinson did not notify the New York state court that the federal district court had earlier entered an order staying LaPrade's action pending arbitration but retaining jurisdiction. The New York state court issued the requested ex parte order staying the arbitration, and the series of nine arbitration sessions scheduled to begin the next day was canceled.

Informed of Liddle & Robinson's ex parte actions before the New York state court only after the stay was granted,

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[1] In its order of March 23, 1994, which consolidated the first and second actions, the district court again directed the parties to "notify the Court once arbitration is completed as to what further proceedings in this Court are appropriate."

Kidder Peabody returned to the district court on November 25, 1996, requesting an emergency order directing LaPrade to withdraw her petition in New York state court, holding Liddle & Robinson in contempt, and imposing sanctions pursuant to 28 U.S.C. § 1927. The district court denied the request for a temporary restraining order, but subsequently issued a preliminary injunction and granted Kidder Peabody's other requests for relief. The New York state court action, the district court found, "constitutes an interference with the arbitration currently pending between the parties ... [and] an interference with the jurisdiction of this Court." Thus, the district court enjoined LaPrade and her counsel from engaging in further proceedings before the New York state court, lifted the stay imposed by that court, and entered sanctions against Liddle & Robinson. On this last point, the district court ordered that:

> plaintiff's counsel, the law firm of Liddle & Robinson, ... shall compensate Kidder, Peabody & Co., for the vexatious and dilatory tactics of plaintiff's counsel in filing *ex parte* papers in the State Court proceeding, without any notice to the State Court of the actions pending before this Court, and without any notice to the State Court of this Court's arbitration orders, all of which multiplied the proceedings.

The district court directed Kidder Peabody to file a statement of "the attorneys' fees, costs, and other expenses reasonably incurred as a result of the improper activities of plaintiff's counsel." Thereafter, Kidder Peabody submitted a figure of $83,279.04, based on a total of 333.5 hours of work by six partners, seven associates, two legal assistants, and four other staffers of Kidder Peabody's counsel. Eighty-six percent of the hours worked by partners was attributable to one partner, however, and eighty-nine percent of the hours worked by associates was attributable to three particular associates. Liddle & Robinson objected to both the district court's decision to grant attorneys' fees and the amount sought by Kidder Peabody. In particular, Liddle & Robinson claimed that the award of fees was inappropriate because its

pursuit of an ex parte state court order was a tactic previously approved by the Second Circuit in *McMahon v. Shearson/American Express, Inc.*, 896 F.2d 17 (2d Cir. 1990); that the attorneys' fees statement showed that Kidder Peabody's counsel performed duplicative and excessive work (although Liddle & Robinson did not challenge the reasonableness of the rate charged per hour); that there was no proof that Kidder Peabody had actually "incurred" the claimed expenses; and that an evidentiary hearing was necessary to determine which fees and expenses were reasonably incurred.

The district court rejected Liddle & Robinson's attempts to reargue the merits of the sanctions award but agreed that Kidder Peabody's proposed figure for attorneys' fees required some adjustment. The court found that Kidder Peabody's counsel had expended an unreasonable number of hours on the project; thus, the district court reduced the award from the requested figure of $83,279.04 to a figure ten percent lower: $74,951.14.

II.

Liddle & Robinson first contends that the district court lacked jurisdiction to enter the sanctions order. Although the district court clearly intended to retain jurisdiction over the stayed actions, Liddle & Robinson maintains that it could not do so under the Arbitration Act. The district court only stayed the actions and never actually ordered the parties to enter arbitration. Hence, Liddle & Robinson contends, it had no jurisdiction over the arbitration proceedings in New York City, and thus no jurisdiction to impose sanctions based on Liddle & Robinson's conduct related to those proceedings.

Liddle & Robinson's contention turns on the distinction between sections 3 and 4 of the Arbitration Act. Section 3 empowers a district court only to stay an action, leaving to the claimant the choice of arbitrating the claims or abandoning them.[2] *See* 9 U.S.C. § 3; *see also The Anaconda v.*

[2] Section 3 of the Arbitration Act provides:

American Sugar Refining Co., 322 U.S. 42, 45 (1944). Section 4 allows the court to issue orders directing arbitration.[3] *See* 9 U.S.C. § 4 (1994). The district court stayed the actions brought by LaPrade against Kidder Peabody under section 3, and did not direct arbitration under section 4; hence, Liddle & Robinson contends that the district court had "no power to superintend and direct the pending arbitration in New York City."

However, the district court did not have to rely upon the Arbitration Act for jurisdiction. The district court's jurisdiction derived from the original diversity suit, which was only

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> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3.

[3] Section 4 of the Arbitration Act provides, in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.

9 U.S.C. § 4.

stayed (*not* dismissed) pending the results of arbitration. While Liddle & Robinson is correct that section 3 of the Arbitration Act was not itself a source of jurisdiction for the district court to consider Kidder Peabody's motion for sanctions, *see Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983), it also did not *divest* the district court of jurisdiction over the case: "The section obviously envisages action in a court on a cause of action and does not oust the court's jurisdiction of the action, though the parties have agreed to arbitrate." *The Anaconda*, 322 U.S. at 44; *accord Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 653–54 (9th Cir. 1991); *Transportes Caribe, S.A. v. M/V Feder Trader*, 860 F.2d 637, 638–39 (5th Cir. 1988); *see also Merill Lynch, Pierce, Fenner & Smith, Inc. v. Cunningham*, 736 F. Supp. 887, 889 (N.D. Ill. 1990).

Even if Liddle & Robinson means to contend that, although the district court still had jurisdiction over the original suit, its jurisdiction was suspended until the arbitration was complete, the contention similarly fails. The Arbitration Act contemplates that courts should not interfere with arbitrations by making interlocutory rulings, *see, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967); *In re Arbitration Between Michaels & Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980), but this general proposition does not aid Liddle & Robinson. The rationale behind the principle disfavoring judicial interference with arbitration supports what the district court did here. The principle is based on the "congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp.*, 388 U.S. at 404; *accord Moses H. Cone*, 460 U.S. at 23. In the instant case, the district court stayed LaPrade's actions, instructing her, in effect, that she could not litigate her claims directly in court, but could only arbitrate them or abandon them. If a party in her position could subsequently go to another court in an attempt to avoid the effect of the order, that party would have an easy route to delay and obstruct the proceedings. The Arbitration Act contemplates no such illogical result and

Liddle & Robinson can point to no persuasive authority suggesting that conclusion.

Rather than interfering with the arbitration proceeding, the district court was attempting to protect that proceeding and the effect of its own order. The district court had ordered LaPrade that she could not pursue her civil remedies without first submitting to arbitration but, in clear contradiction of that order, Liddle & Robinson appealed to the state court to stay the arbitration and remit the parties to judicial remedies, without even informing that court of the district court's instructions. Clearly, the district court had jurisdiction to address this situation: it retained jurisdiction over the original suit, and the Arbitration Act did not divest it of jurisdiction to ensure that the parties adhered to its previous order under the Arbitration Act. Liddle & Robinson's contention that the district court was without jurisdiction to impose sanctions is meritless.[4]

III.

The question remains whether the district court abused its discretion in imposing sanctions for Liddle & Robinson's "vexatious and dilatory tactics" under 28 U.S.C. § 1927, which provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case

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[4] The Arbitration Act does not provide that the district court loses venue if the arbitration proceeds in another judicial district. *See, e.g., Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 1998 WL 188633, at *2–*4 (4th Cir. Apr. 22, 1998); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 706 (2d Cir. 1985). We have no occasion to address whether other state or federal courts could have provided Kidder Peabody with similar relief. It suffices to note that once venue was established in regard to institution of the lawsuit, *see Minnesota Mining & Mfg. Co. v. Eco Chem., Inc.*, 757 F.2d 1256, 1264 (Fed. Cir. 1985), the district court did not lose venue because the parties arbitrated elsewhere.

> unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (1994). Liddle & Robinson contends that the district court abused its discretion in imposing sanctions, in setting the level of the attorneys' fees award, and in refusing to hold an evidentiary hearing on the attorneys' fees issue. This court reviews a district court's decision to award attorneys' fees under 28 U.S.C. § 1927, and the way it chooses to set the award, only for abuse of discretion. *See Copeland v. Marshall*, 641 F.2d 880, 901 (D.C. Cir. 1980) (en banc). Although this court has not directly established the standard of review for a district court's decision whether to hold an evidentiary hearing on an attorneys' fees application, the appropriate standard again appears to be abuse of discretion. *See* D.D.C.R. 108(f); *McLaughlin v. Bradlee*, 803 F.2d 1197, 1205–06 (D.C. Cir. 1986); *Copeland*, 641 F.2d at 905. We find none.

A.

First, Liddle & Robinson contends that the district court's decision to impose sanctions under 28 U.S.C. § 1927 was an abuse of discretion because the decision to seek an ex parte order in New York state court was justified by precedent and thus neither "unreasonable" nor "vexatious" under the statute. Liddle & Robinson maintains that the Second Circuit specifically approved this tactic in a substantially similar case, *McMahon v. Shearson/American Express, Inc.*, 896 F.2d 17 (2d Cir. 1990), and thus that Liddle & Robinson's actions could not have been so unreasonable as to merit sanctions.

A review of *McMahon* shows how different that case is from this one. Plaintiffs Eugene and Julia McMahon sued defendant Shearson/American Express ("Shearson") in district court based on allegations of fraud and misrepresentation in its management of their profit sharing and pension plans. *See id.* at 19. Upon opening their accounts, the McMahons had signed customers' agreements that included

an arbitration provision, and after they filed their complaint, Shearson sent them a letter indicating its intent to file a motion to compel arbitration and requesting that they select an arbitral forum, as was their right under the arbitration provision. *See id.* The McMahons responded that the issue of the arbitral forum was premature and that they would select a forum only after a court declared the arbitration provision enforceable, at which point Shearson, claiming that the McMahons had waived their right, chose the New York Stock Exchange ("NYSE") as the forum. *See id.* On Shearson's motion, the district court stayed certain portions of the action under section 3 of the Arbitration Act. *See id.* at 19–20. When the appeals from that order were completed, the issue of arbitral forum resurfaced: the McMahons claimed that they retained the option to choose a forum, while Shearson maintained that its previous selection of the NYSE was binding. *See id.* at 20. Declining to resolve the issue, the district court directed the parties to reach agreement on their own, but the two sides subsequently began two separate arbitration proceedings—Shearson at the NYSE and the McMahons at the American Arbitration Association. *See id.* At that point, seeking to vindicate his clients' right to choose the arbitral forum, the McMahons' counsel filed an ex parte motion in New York state court for an order to show cause why the NYSE arbitration should not be stayed. *See id.* The defendant sought relief from the district court, and the McMahons' counsel agreed to postpone the proceedings before the state court. *See id.* Ruling that the defendant's initial election of the NYSE forum was valid, the district court imposed sanctions against plaintiffs' counsel under both Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927. *See id.* at 20–21.

Because of its conclusion that the actions of the McMahons' counsel had not been taken in bad faith, the Second Circuit reversed the imposition of sanctions under 28 U.S.C. § 1927. *See id.* at 23–24. Noting that the district court had expressly declined to decide the issue of the arbitral forum, the court sketched the counsel's unpalatable options:

> Examining [counsel's] alternatives for preserving his clients' right to choose a forum, we conclude that his choices were limited. One was a return to federal court—where the judge had already refused to rule. Another was to seek relief from state court, pursuant to a New York statute governing arbitration.

Id. at 23. The court concluded that counsel's "decision to involve the state court in the dispute was perhaps unorthodox, but under the circumstances ... [could not] be characterized either as subterfuge or an attempt to evade the jurisdiction of the federal court," *id.*, but rather seemed "a good faith attempt to preserve what counsel believed to be his clients' right to choose an arbitral forum," *id.* at 24.

McMahon is distinguishable from the instant case in many important respects. Perhaps most notably, the McMahons' counsel went to the state court for resolution of an issue the district court had declined to settle; in the instant case, by contrast, Liddle & Robinson went to state court for relief that was plainly inconsistent with the previous district court order. The McMahons' counsel filed for an ex parte order in order to *protect* the arbitration procedure by establishing the correct arbitral forum, not to circumvent the arbitration altogether; as the Second Circuit emphasized, the attempt to secure an ex parte order was not "an attempt to evade the jurisdiction of the federal court," *id.* at 23. Here the opposite appears true. *See supra* Part II. Furthermore, the timing of Liddle & Robinson's excursion to state court was more egregious: the McMahon's counsel went to state court at the start of the arbitration, *see McMahon v. Shearson/American Express Inc.*, 709 F. Supp. 369, 372 (S.D.N.Y. 1989), *rev'd*, 896 F.2d 17 (2d Cir. 1990), whereas Liddle & Robinson sought state court relief after extensive discovery had been completed, on the day before hearings were to recommence after a seventeen-month delay. Finally, unlike Liddle & Robinson, the McMahons' counsel at least informed the state court of the district court's role in the proceedings, although the district court found the representations to the state court deceptive. *See id.* at 375 n.22. *McMahon* does not justify Liddle & Robinson's actions.

Four and one-half years after the initial suit was stayed and the day before hearings were to restart after seventeen months of delay, Liddle & Robinson filed an ex parte action in New York state court to stay the hearings, without informing that court of the district court's orders or the district court's ongoing jurisdiction. Under the circumstances, the district court was well within its discretion to impose sanctions under 28 U.S.C. § 1927.

B.

Second, Liddle & Robinson contends that, even if the district court could have imposed sanctions, it did not support its order with sufficient findings of fact. This court has not yet established whether the standard for imposition of sanctions under 28 U.S.C. § 1927 should be "recklessness" or the more stringent "bad faith." *See United States v. Wallace*, 964 F.2d 1214, 1218–19 (D.C. Cir. 1992). Liddle & Robinson contends that, no matter the proper standard, the district court did not make findings of fact sufficient to support its decision to sanction. To the contrary, the record makes clear that, no matter which standard applies, the district court found that Liddle & Robinson's actions qualified.

Although the district court concluded that Liddle & Robinson's actions were "vexatious and dilatory" and "improper," and clearly believed that Liddle & Robinson was acting in bad faith, Liddle & Robinson objects to the district court's failure actually to make a finding of recklessness or bad faith. In the key passage in the order imposing sanctions, the court ordered,

> pursuant to 28 U.S.C. § 1927, that plaintiff's counsel, the law firm of Liddle & Robinson, shall compensate Kidder, Peabody & Co., for the vexatious and dilatory tactics of plaintiff's counsel in filing *ex parte* papers in the State Court proceeding, without any notice to the State Court of the actions pending before this Court, and without any notice to the State Court of this court's arbitration orders, all of which multiplied the proceedings.

Later, in the order setting the award, the court specifically found that Liddle & Robinson's actions "unreasonably and vexatiously" multiplied the proceedings. These passages certainly imply that the district court thought the firm was acting in bad faith, but Liddle & Robinson is correct that the district court never stated this explicitly in its orders.

The fact that the district court never explicitly said the words "bad faith" or "recklessness" does not demonstrate an abuse of discretion: "these words are not talismans required for affirmance." *Eisenman v. Peoro (In re Peoro)*, 793 F.2d 1048, 1051 (9th Cir. 1986). According to the language of 28 U.S.C. § 1927, the district court must find that "the offending attorney's multiplication of the proceedings was both 'unreasonable' and 'vexatious.'" *Travelers Ins. v. St. Jude Hosp. of Kenner, La.*, 38 F.3d 1414, 1416–17 (5th Cir. 1994) (quoting *FDIC v. Conner*, 20 F.3d 1376, 1384 (5th Cir. 1994)). For such a finding to be valid, "evidence of recklessness, bad faith, or improper motive must be present." *Id.* at 1517. Here the district court made the requisite findings that Liddle & Robinson's actions were unreasonable and vexatious, and there was sufficient evidence of bad faith and recklessness to support these findings. Moreover, given the ample evidence that the district court believed Liddle & Robinson acted in bad faith and recklessly,[5] it would be an empty formalism to find an abuse of discretion simply because the district court failed to invoke the magic words "bad faith" or "recklessness," and we decline to do so.

C.

Third, Liddle & Robinson contends that, even if sanctions were appropriate, the district court abused its discretion in awarding $74,951.14. In particular, Liddle & Robinson contends that the statement filed by Kidder Peabody was so "outrageously unreasonable" that, under *Environmental De-*

[5] In numerous pointed statements to a representative of Liddle & Robinson in two hearings, the district court made clear its view that the facts supported an award of attorneys' fees whether the proper standard was recklessness or bad faith.

fense Fund, Inc. v. Reilly, 1 F.3d 1254 (D.C. Cir. 1993), the district court ought to have denied Kidder Peabody any award at all. *Id.* at 1258. Instead, considering the proposed fee award of $83,279.04 based on 333.5 hours of work by Kidder Peabody's counsel, the district court awarded $74,951.14, a figure ten percent below Kidder Peabody's lodestar figure.

Admittedly, 333.5 hours of work seems a high figure for actions taken in response to Liddle & Robinson's ex parte action in state court, and it seems a bit excessive that six partners, seven associates, two legal assistants, and four other staffers worked on the matter. Although Liddle & Robinson did not challenge the rate charged per hour, the district court agreed that the basis for the resulting fees was unreasonable "both in terms of the number of attorneys and the number of hours." Faced with these unreasonable figures, the district court heeded this court's decision in *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc), in which the court held that a district court judge—"recognizing, as he did, that some duplication or waste of effort had occurred—did not err in simply reducing the proposed 'lodestar' fee by a reasonable amount without performing an item-by-item accounting." *Id.* at 903. Although a district court might in some circumstances consider a fee request, or a particular item within a fee request, so "outrageously unreasonable" that outright denial of the request or an item within the request would be appropriate, *Environmental Defense Fund*, 1 F.3d at 1258 (quoting *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980)) (internal quotation marks omitted), the district court's decision to award a lesser figure than the lodestar request, rather than denying the request outright, was within the district court's discretion.[6] *See id.* at 1260; *Copeland*, 641 F.2d at 900–08.

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[6] Liddle & Robinson's assertion that the record contains no proof that Kidder Peabody actually "incurred" these costs (that is, actually paid its counsel for services rendered) is belied by a certificate filed by Kidder Peabody's counsel stating that Kidder Peabody paid its counsel $83,279.04. *See* FED. R. APP. P. 10(a); D.C.

D.

Nor is Liddle & Robinson's position that the district court abused its discretion by not holding an evidentiary hearing on the attorneys' fees issue after the court decided to impose sanctions persuasive. This failure, Liddle & Robinson insists, violated due process because 28 U.S.C. § 1927 is a punitive statute and, hence, Liddle & Robinson should have been allowed to inquire at an evidentiary hearing into what expenses were actually incurred and how reasonable such expenses were.

Although a hearing may certainly be "useful" in some instances, *see Copeland*, 641 F.2d at 905, and "it is perhaps conceivable that due process could require a hearing on sanctions ... in certain circumstances," a hearing is not required in all circumstances. *McLaughlin*, 803 F.2d at 1205. Regarding sanctions under Federal Rule of Civil Procedure 11, the court stated in *McLaughlin*:

> The trial court, as a primary participant in the proceedings, had already observed those elements of the litigation most relevant to the criteria for imposing sanctions under the rule, most notably McLaughlin's conduct during the trial.... The opportunity the District Court provided McLaughlin to respond to the defendants' applications for fees and costs gave him ample opportunity to set forth whatever objections he had to the level of sanctions imposed.

Id. at 1205–06 (citation omitted). Here, as in *McLaughlin*, the party against whom sanctions have been imposed has had ample opportunity to set forth arguments in opposition to sanctions. Liddle & Robinson has no valid objection based in due process, and the district court did not abuse its discretion in deciding that a hearing was unnecessary.

Accordingly, we hold that the district court had jurisdiction to impose sanctions upon Liddle & Robinson and that in so doing it did not abuse its discretion, and we affirm.

CIR. R. 30(b). Liddle & Robinson has introduced no contradictory evidence.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED AND FILED JUNE 23, 1998

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-7107

Linda E. LaPrade, Liddle & Robinson, L.L.P.,

Appellant

v.

Kidder Peabody & Co., Incorporated,

Appellee

Appeal from the United States District Court
for the District of Columbia
(No. 91cv03330)

Before: WILLIAMS, RANDOLPH and ROGERS, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the judgment of the District Court appealed from in this cause is

hereby affirmed, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Date: June 23, 1998

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ENTERED MAY 31, 1997 AND FILED JUNE 2, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-3330
(HHG)

LINDA E. LaPRADE,

Plaintiff,

v.

KIDDER, PEABODY & CO.,

Defendant.

Civil Action No. 93-0323
(HHG)

LINDA E. LaPRADE,

Plaintiff,

EDWARD CERULLO and PAUL SALZMAN,

Defendants.

Appendix C

MEMORANDUM and ORDER

Before the Court are the statement of defendant Kidder, Peabody & Co. of its attorneys' fees, costs, and other expenses, plaintiff's opposition thereto, defendant's reply and amended statement of fees and costs. Upon order by the Court rejecting plaintiff's request for an evidentiary hearing on the fee award, plaintiff filed a more detailed opposition to which defendants have replied. Defendant seeks to recover $83,279.04 in fees, expenses, and costs pursuant to 28 U.S.C. § 1927 and this Court's order of December 9, 1996.

I

These cases arise from plaintiff's termination by her employer Kidder, Peabody. In 1994, the Court stayed the consolidated cases pending arbitration before the National Association of Securities Dealers ("NASD"). Arbitration has proceeded at a snail's pace to this point. On November 20, 1996, the day that arbitration sessions were to resume after a 17 month delay, plaintiff filed an *ex parte* order to show cause in the Supreme Court of the State of New York, without any notice to the State Court of the actions pending before this Court and without any notice to the State Court of this Court's arbitration orders. The State Court stay had the effect of canceling all nine arbitration sessions scheduled for late November and early December, 1996.

Seeking to lift the State Court's stay of the NASD arbitration, on November 26, 1996, defendant Kidder, Peabody filed in this Court an application for a temporary restraining order and an order to show cause, and a memorandum of law in support. The Court conducted a hearing on November 26, 1996

and declined to grant a temporary restraining order. Kidder, Peabody filed a motion for an injunction and for summary judgment on November 29, 1996, and a reply memorandum to plaintiff's opposition papers on December 5, 1996. After a hearing on December 6, this Court issued an order lifting the State Court's stay of arbitration and awarding Kidder, Peabody its attorneys' fees, costs, and other expenses reasonably incurred, pursuant to 28 U.S.C. § 1927, for plaintiff's, actions of unreasonably and vexatiously multiplying the proceedings in this case.

II

The fee award, called the "lodestar," is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate, and adding to that reasonable expenses. *Blum v. Stenson*, 465 U.S. 886, 888 (1984). The party seeking attorneys' fees has the burden of proving that its request is reasonable. *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990). To establish the reasonableness of its request, "the fee petitioner 'must submit evidence supporting the hours worked and rates claimed.' " *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The party disputing the fee petition must make specific objections that are sufficient to give the fee petitioner notice of the objections to the requested fee. After objections are filed, the district court has a great deal of discretion to adjust the fee award in light of the objections. *Id.*

In its amended statement of attorneys' fees, costs, and other expenses in connection with the proceedings in this Court during the period November 20 to December 6, 1996, Kidder, Peabody claims that it is entitled to $83,279.04: $76,457.90 in fees for

attorneys, Morgan, Lewis & Bockius LLP; $1,520 in fees for attorneys, Boraks & Jamnback; and $5,301.14 in expenses incurred by Morgan, Lewis & Bockius LLP. Defendant Kidder, Peabody supports this claim with a statement summarizing the hours expended, the hourly rates charged, and other expenses incurred in seeking to lift the stay of arbitration.

Plaintiff objects to the requested fees and expenses as being excessive and unreasonable, and as being not adequately documented.[1] Plaintiff does not challenge the reasonableness of the hourly rate charged by defendant's attorneys.

Plaintiff's challenge to the adequacy of the documentation is without merit. Kidder, Peabody submitted time records that indicate the amount of time expended, a brief description of work done during that time, the date of the work, and the name of the attorney or legal assistant responsible for the services. Kidder, Peabody has also submitted detailed descriptions of all expenses incurred, including the date, amount, and nature of each expense, and copies of receipts for the lead counsel's travel from New York to Washington, D.C. for purposes of oral arguments before this Court.

Plaintiff's challenge to the reasonableness of the hours expended, on the other hand, has some merit. The fee award at issue represents compensation for time expended in seeking a temporary restraining order and, after the Court declined to issue such an order, a preliminary injunction on the same issue. The issue for briefing was whether, in these circumstances, a federal court had the authority to enjoin proceedings in state court in order to protect the jurisdiction of the federal court. Agreeing with defendant, this Court concluded that it had such

1. Plaintiff also attempts to reargue the merits of the sanctions award, but the Court rejects this argument as untimely and without merit.

authority, and accordingly, lifted the stay issued by the state court.

Kidder, Peabody argues that the hours expended were reasonable in light of the complexity of the legal issues, the urgency of the need for relief, and complications stemming from plaintiff's choice of different fora in which to pursue her claims. There is no question that defendant urgently needed relief in order to preserve the arbitration sessions scheduled after a lengthy delay. The Court so concluded in granting defendant's motion for an injunction. Although the issue of jurisdiction is complicated, the Court finds defendant's argument as to the complexity of the case somewhat overstated. Defendant emphasizes that it filed twelve pleadings in connection with this matter, but some of these pleadings — such as the notice of entry of appearance or proposed orders — should not have occupied much time of Kidder, Peabody's attorneys.

Kidder, Peabody's counsel, Morgan, Lewis & Bockius LLP, claims that the preparation and argument of the proceedings before this Court required the efforts of six partners, seven associates, two legal assistants and four other members of counsel's staff totaling 333.5 hours. Upon closer inspection, 86% of the fee hours by partners were billed by the one lead partner, and 89% of the associate fee hours were billed by three associates. Nine attorneys claim to have spent over 100 hours in research; four attorneys claim to have spent almost 100 hours drafting and revising the motion papers, and the same four attorneys claim to have spent over 40 hours "finalizing" the motion papers — although as defendant points out, the attorneys did not all finalize the same documents.

Plaintiff specifically challenges the reasonableness of these fees, and the Court agrees that they are unreasonable both in

terms of the number of attorneys and the number of hours. The Court does not doubt that Kidder, Peabody's counsel actually worked the number of hours claimed. Attorneys in large private law firms frequently are required to work much longer than eight-hour days, especially in the context of an expedited briefing schedule such as was involved here. However, "[i]t does not follow that the amount of time *actually* expended is the amount of time *reasonably* expended. In the private sector, 'billing judgment' is an important component in fee setting." *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) The quality of Kidder, Peabody's pleadings and arguments before the Court was top-notch, but it nevertheless was accomplished via some apparent duplication of effort in both research and writing. There was no need for more than three associates to work on this matter, nor was it reasonable for nine attorneys to conduct research.

In *Copeland*, our Court of Appeals held that a district court judge "recognizing, as he did, that some duplication or waste of effort had occurred — did not err in simply reducing the proposed 'lodestar' fee by a reasonable amount without performing an item-by-item accounting." *Id.* at 903. In light of the objections raised by plaintiff, the Court will reduce the lodestar by 10%, to $74,951.14.

Upon consideration of the written submissions of the parties and affidavits, it is this 31st day of May 1997,

ORDERED that defendant is awarded counsel fees and costs in the amount of seventy-four thousand, nine hundred and fifty-one dollars, and fourteen cents ($74,951.14).

s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ENTERED AND FILED APRIL 4, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-3330
(HHG)

LINDA E. LAPRADE,

Plaintiff,

v.

KIDDER, PEABODY & CO., INC.,

Defendant.

Civil Action No. 93-0323
(HHG)

LINDA E. LAPRADE,

Plaintiff,

v.

EDWARD CERULLO, et al.,

Defendants.

Appendix D

ORDER

Pursuant to this Court's December 9, 1996 Order, Kidder, Peabody & Co., Inc., filed their statement of attorneys' fees, costs, and other expenses reasonably incurred as a result of the improper activities of plaintiff's counsel. Kidder, Peabody thereafter submitted an amended statement on January 15, 1997.

Liddle & Robinson submitted a two-page statement in opposition, which is based on a certificate by W. Dan Boone, counsel with the firm of Liddle & Robinson. The Court finds that the "opposition" contains only general objections and falls short of challenging the reasonableness of the hourly rate charged or the adequacy of the documentation of fees requested. The party disputing the fee petition must make specific objections that are sufficient to give the petitioner notice of the objections to the requested fee, which in turn provides the district court with discretion to adjust the fee award in light of the objections. *See Rode* v. *Dellarciprete*, 892 F.2d 1177 (3rd Cir. 1990).

Accordingly, it is this 4th day of April, 1997

ORDERED that plaintiff shall submit an appropriate opposition within twenty days of the date of this Order or the Court will treat defendants' statement as conceded.

s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED DECEMBER 9, 1996

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-3330
(HHG)

LINDA E. LaPRADE,

Plaintiff,

v.

KIDDER, PEABODY & CO.,

Defendants.

Civil Action No. 93-0323
(HHG)

LINDA R. LaPRADE,

Plaintiff,

v.

EDWARD CERULLO and PAUL SALZMAN,

Defendants.

Appendix E

ORDER

Upon consideration of the written submissions of the parties and affidavits, and upon hearing argument of counsel on defendant's motion for an injunction and for summary judgment, the Court finds that the action initiated by plaintiff in the Supreme Court of the State of New York, County of New York (the "State Court"), before Justice Emily Jane Goodman, constitutes an interference with the arbitration currently pending between the parties before the National Association of Securities Dealers ("NASD arbitration") pursuant to the Federal Arbitration Act; and further that such State Court action constitutes an interference with the jurisdiction of this Court and this Court's Orders of June 24, 1992 and March 23, 1994.

It is ORDERED that plaintiff, Linda E. LaPrade, and plaintiff's counsel are hereby enjoined until further order of this Court from engaging in proceedings of any kind before the Supreme Court of the State of New York, whether pursuant to actions previously filed in this Court or pursuant to new actions, and whether by the filing of documents or by oral representations, regarding the pending NASD arbitration between the parties on plaintiff's claims of breach of contract, fraud, sex discrimination, abusive discharge, or any other claims relating to her employment with Kidder Peabody & Co., Inc.; and it is further

ORDERED, pursuant to 28 U.S.C. § 2283 that, in order to protect its judgments and because it is necessary in aid of its jurisdiction, the stay of NASD arbitration entered by Justice Emily Jane Goodman of the Supreme Court of the State of New York on November 19, 1996 be and it is hereby LIFTED, and it shall have no effect; and it is further

Appendix E

ORDERED that plaintiff and plaintiff's counsel proceed with the hearing sessions scheduled in the pending NASD arbitration between the parties on December 10, 11, 12 and 19, 1996, such other hearing sessions as may he scheduled, and on no fewer than five dates that are convenient to the NASD, the members of the Arbitration Panel, and Kidder, Peabody & Co., Inc. during the months of January, February, and March 1997; and it is further

ORDERED that this Court will be available throughout the period of the arbitration to entertain applications concerning alleged interference or attempts to interfere with the orders of this Court in the above-entitled action and with alleged interferences or attempts to interfere with the arbitration; and it is further

ORDERED, pursuant to 28 U.S.C. § 1927, that plaintiff's counsel, the law firm of Liddle & Robinson, is hereby sanctioned and it shall compensate Kidder, Peabody & Co., for the vexatious and dilatory tactics of plaintiff's counsel in filing *ex parte* papers in the State Court proceeding, without any notice to the State Court of the actions pending before this Court, and without any notice to the State Court of this Court's arbitration orders, all of which multiplied the proceedings by requiring this Court to consider and rule on this motion for a preliminary injunction and related proceedings; the amount of the sanction to be paid to be fixed after defendants file with the Court a statement of the attorneys' fees, costs, and other expenses reasonably incurred as a result of the improper activities of plaintiff's counsel.

December 9, 1996

s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

APPENDIX F — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ENTERED AND FILED JUNE 24, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-3330
(HHG)

LINDA E. LaPRADE,

Plaintiff,

v.

KIDDER, PEABODY, & CO.,

Defendant.

MEMORANDUM AND ORDER

This lawsuit involves common law and statutory claims by plaintiff against her former employer. This memorandum addresses several outstanding motions.

Plaintiff has filed a sealed motion, pursuant to Fed.R.Civ.P. 12(f), to strike and seal portions of defendant's memorandum in support of defendant's motion to stay pending arbitration on the grounds that portions of defendant's memorandum are immaterial and scandalous. Plaintiff has shown no good cause in support of such a motion, and furthermore it is untimely under Rule 12(f). Accordingly, it will be denied.

Appendix F

Defendant has moved to stay this action pending arbitration on the grounds that plaintiff signed a Uniform Application for Securities Industry Registration or Transfer (Form U-4) which contains a binding arbitration clause. The Federal Arbitration Act, 9 U.S.C. § 3, requires courts to stay suits based upon "any issue referable to arbitration under an agreement in writing. . . ." That statute applies to cases such as this. *See Perry* v. *Thomas*, 482 U.S. 483 (1987) ; *Gilmer* v. *Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991).[1] Plaintiff's arguments that her dispute goes to the validity of the arbitration provision at issue and that she is entitled to a factual hearing on that question are without merit. Furthermore, "the federal policy favoring arbitration counsels that doubts about the intended scope of an agreement to arbitrate be resolved in favor of the arbitral process." *Pearce* v. *E.F. Hutton Group, Inc.*, 828 F.2d 826, 829 (D.C. Cir. 1987).

Plaintiff also has moved for leave to amend her opposition to defendant's application for a stay. This request was previously addressed by the Court on March 26, 1992 when it denied plaintiff's motion for leave to submit a supplemental memorandum, and accordingly is denied now.

Plaintiff also moves to strike the exhibit (a copy of the U-4 form) attached to defendant's motion to stay pending arbitration and to order that defendant produce the original U-4 form for inspection on the grounds that plaintiff's signature on that form may be a forgery. Plaintiff has already conceded that she executed a U-4 form, *see* First Amended Complaint at ¶ 84

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1. The *Gilmer* Court particularly noted that § 1 of the Federal Arbitration Act, which exempts certain "contracts of employment" from the scope of the statute, does not apply to arbitration agreements in securities registration applications. 111 S. Ct. at 1652 n.2.

[sic],[2] and therefore the motion is without merit and will be denied.

Accordingly, it is this 24th day of June 1992

ORDERED that plaintiff's motion to file to strike and seal portions of defendant's memorandum in support of defendant's motion to stay be and it is hereby denied; and it is further

ORDERED that defendant's motion to stay this action pending arbitration be and it is hereby granted, and the parties shall notify the Court once arbitration is completed as to what further proceedings in this Court are appropriate; and it is further

ORDERED that plaintiff's motion for leave to amend the opposition to defendant's application for a stay be and it is hereby denied;w and it is further

ORDERED that plaintiff's motion to strike the exhibit attached to defendant's motion to stay and to order that defendant produce a document be and it is hereby denied.

s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

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2. Indeed, plaintiff was required to sign such a form in order to become a registered representative of defendant with various self-regulatory organizations designated by the Securities and Exchange Commission.

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING SUGGESTION FOR REHEARING FILED AUGUST 24, 1998

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-7107 **September Term, 1997**
91-cv03330

Liddle & Robinson, L.L.P.,

Appellant

v.

Kidder Peabody & Co,

Appellee

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote; it is

ORDERED that the suggestion be denied.

Appendix G

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judges Silberman, Ginsburg, Henderson and Garland did not participate in this matter.

APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 24, 1998

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-7107 **September Term, 1997**
91cv03330

Liddle & Robinson, L.L.P.,

Appellant

v.

Kidder Peabody & Co,

Appellee

BEFORE: Williams, Randolph and Rogers, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed July 23, 1998, it is

ORDERED that the petition be denied.

Per Curiam

Appendix H

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk